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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

LOYEL SCHUTTERLE,

PETITIONER,

vs.

UNITED STATES OF AMERICA, sued as United States; UNITED STATES DEPARTMENT OF AGRICULTURE; ROBERT PURCELL, as agent for USDA; AUGUST HONSELL; JOHN DOE(S), 1-10; JANE DOE(S), 1-10,

RESPONDENTS.

TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARLYN S. JENSEN, 516-42-7986
2225 Robin Street
Osceola, Iowa 50213-8208
Telephone (515) 342-3530

ATTORNEY FOR PETITIONER.

69 pp

QUESTIONS PRESENTED

ISSUE NO I: The District Court erred, when it refused to find or declare that, for multiple reasons, regulation 7 C.F.R. Part 1 (55 Federal Register 42347, October 19, 1990) is constitutionally impermissible, invalid and repugnant, facially and as being applied.

A. The regulation is legislation attempted by Executive Branch which exceeds the powers granted by Article II.

B. The Regulation is legislation attempted by Executive Branch which violates Separation of Powers.

C. The Regulation exceeds any powers granted by Article I, Section 8, concerning Congressional legislation; by implication, therefore exceeds any power of Executive Branch to legislate; and to the extent that Congress may have purported to delegate such right to legislate exceeds the power to so delegate.

D. The Regulation denies due process of law guaranteed by the Fifth and Fourteenth Amendments including without limitation, by denying necessary witnesses to a party in the state forum to obtain meaningful hearing; is impermissibly vague and indefinite; and authorizes ad hoc determinations by Executive Branch employees concerning testimony allowed in each case without definite pre-set standards, and is arbitrary and capricious including for the reason that it only permits testimony of those deemed favorable to the agency.

E. The Regulation denies Equal Protection of law and equal opportunity at the bar of justice, including for reasons set forth above, guaranteed by the Fifth amendment and implied from the Fourteenth Amendments.

F. The Regulation interferes with state sovereignty and the separation and balance of powers inherent in the concept of federalism as intended by the Founders, and thereby denies individual rights under the Ninth, Tenth and Fourteenth amendments; and without limitation, it purports to allow federal Executive Branch to sort through and pre-determine which witnesses can testify in a state forum concerning agency work product.

G. The Regulation limits and denies access to the Iowa Court, and the right to petition for redress, by denying the most knowledgeable witnesses to that forum; and sweeps protected activity into the prohibited area, in violation of the First and Fourteenth Amendments.

H. The Regulation denies to Schutterle as an inhabitant of Iowa full access to the guarantees inherent in a Republican Form of Government, by implication if not directly, by allowing only witnesses deemed favorable to the Agency to testify in the state court concerning a federal work product being utilized for state purposes, and by denying to him in that forum, other Agency witnesses knowledgeable and willing to testify against the Agency work product.

I. The Regulation violates the Doctrine of Ipse Dixit, and is subject to the presumption of

unconstitutionality.

J. Schutterle has standing in this matter.

K. District Court and the Circuit Court had full jurisdiction.

ISSUE NO II: Promulgation of the Modern Soil Survey with no means whereby an aggrieved party could obtain meaningful review within the agency for correction of error is a denial of Due Process.

ISSUE NO III: Federal Courts have no inherent power to, and under Article III cannot, legislate exception to the "every person" language of Section 1983, a clear and unequivocal remedy duly enacted by the Congress; federal law has no interest to be advanced by creating exception for state judges to the "every person" language of Section 1983, and under the Supremacy Clause a state cannot create an immunity in state judicial officers which would diminish or defeat a federally-legislated remedy; and because a state judge has a duty to uphold the federal constitution, and under federal Due Process the state constitution, Schutterle had standing, and the federal court had jurisdiction, on claim for past damage, and for injunction and declaratory relief to prevent probable future damage.

LIST OF PARTIES

LOYEL SCHUTTERLE is an individual citizen.

UNITED STATES OF AMERICA sued as United States acting through the Department of Agriculture is the federal government acting through the Executive Branch.

UNITED STATES DEPARTMENT OF AGRICULTURE is an independent agency acting within Executive Branch.

ROBERT PURCELL, as agent for USDA is the regional counsel for that agency.

AUGUST HONSELL is an appointed judicial officer for the State of Iowa.

JOHN DOE(S), 1-10 and JANE DOE(S), 1-10 were referred to as individuals within Executive Branch acting detrimental to Plaintiff and whose specific acts and identities is not, and cannot be known by Plaintiff without discovery.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner petitions this Court to issue Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review and reverse decision.

OPINIONS BELOW

This petition seeks review of proceedings in the United States Court of Appeals which entered order on January 19, 1996, sustaining judgment of the United States District Court.

JURISDICTION

Jurisdiction here is pursuant to 28 USC Section 1254, and in the Court of Appeals under 28 USC Section 1291. In the District Court it included 28 USC 2201; 28 USC 1346(a); 28 USC 1346(b); Amendments I, V, IX and X under Bivens; Art 4, Sec 4; and 42 U.S.C. Sec 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS:

This case questions whether the Executive Branch could under Article II, Amendment X, and otherwise, promulgate Regulation 7 C.F.R. Part 1 (55 Federal Register 42347, October 19, 1990).

It also concerns whether Executive Branch can promulgate a Modern Soil Survey demonstrably incorrect having direct bearing upon state substantive rights and then deny a procedural means by which to seek correction, without denying Due Process.

It also concerns whether this Court can constitutionally create or "find" exception to the unequivocal "every person" language of 42 U.S.C. Sect 1983.

STATEMENT OF THE CASE

NATURE OF THE CASE: This is a civil case. It was directed against federal actors for injunctive and declaratory relief, under Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and against a state judicial officer under 42 U.S.C. 1983.

COURSE OF THE PROCEEDINGS: Originally, Schutterle

commenced action in an Iowa state court challenging an Iowa real property assessment which was based upon the federal Modern Soil Survey. Schutterle subpoenaed to the state forum a federal employee who would testify that the Survey was not accurate concerning the land in issue. While this was pending, a federal regulation was promulgated which provided that the Agency would consent only to employees testifying in favor of the Agency. The Agency would not allow its employee subpoenaed by Schutterle to testify although it did allow a witness to testify who favored the Agency. Schutterle objected to the state court that such regulation violated his federal rights. The Iowa court refused to hear such issues, stating that they could be taken to federal court. In the state proceeding the state head of the S.C.S. admitted that there was no procedure by which Schutterle could attain hearing to correct the federal Survey.

Action in federal court was commenced against federal actors by Schutterle purporting to be based upon Section 1983 of Title 42, which provides relief only concerning state actors. He attempted amendment which was refused, apparently by order of the Magistrate. The federal defendants were granted summary judgment without any discovery.

Action against the state judicial officer for denial of Schutterle's federal rights sought not only damages but declaratory and injunctive relief. It was dismissed for absolute immunity, with attempted amendment denied.

STATEMENT OF THE FACTS: Federal Actors within the United States Department of Agriculture prepared a "Modern Soil Survey" which incorrectly depicts the following Iowa land of Schutterle:

> NE 1/4 SW 1/4 of Section 6-T81-9W of 5th P.M., Iowa County.

Iowa statute as applied requires that the federal Survey must be used by Iowa officials to assess property for taxation. The property is incorrectly overly assessed. Iowa officials perceive that they lack the power to correct the federal Survey or to refuse its use.

I.C.A. 441.21 (1)(f) mandates that in those counties in which field work has been completed, the assessor "shall place emphasis upon the results of the survey" [Modern Soil Survey]. In the Iowa proceeding contesting the assessment, Stradley, an official within the Iowa Department of Revenue and Finance, testified that Iowa assessors must always follow the federal Survey:

> A. I can't recall any exceptions in my knowledge in the State of Iowa that we would not require -- have not gone in and say, 'You have a modern soil survey. Use it.'
>
> Q. Even if it's demonstrated by clear and convincing evidence that the soil survey is inaccurate as to a particular forty acre tract?
>
> A. Well, if -- if that was the factual case, I don't know. In my seventeen years, I have never seen that happen so I suppose, you know, I guess that there could be an error in assessment, but I've never seen it."

Damage to Schutterle, will reoccur as long as the federal Survey remains in error. The Assessor set value of tract in 1987 at $22,307. The Board of Review lowered this to $17,845. In 1989, without having taken any appeal of the prior valuation, the Assessor again increased the valuation of this tract to $22,307. Appeal was again required to the Iowa courts, at great expense to Schutterle.

Schutterle has no means to obtain a correction of the

Survey in the federal agency which prepared it. He could not obtain correction by the Iowa Assessor, and the Iowa courts lack power to modify federal works. The regulation will deny to Schutterle future testimony of federal persons most knowledgeable concerning the Survey.

The practical result is that federal actors have compiled false information (an inaccurate measuring stick) which is used by state officials for tax assessment purposes. State officials perceive that they must honor the federal Survey. Federal Actors have refused to correct such Survey as it pertains to Plaintiff, but also have denied a procedural means to seek correction.

Schutterle contested the accuracy of this Survey as it pertains to a specific tract in an appeal of the assessment to the Iowa Court. While such contest was pending in the Iowa Court, Federal Actors inside Executive Branch promulgated the federal regulation controlling which of its employees could testify in a state court concerning the accuracy of that Modern Soil Survey. Not only did the Federal Actors refuse to provide a federal means by which correction of the Survey could be obtained, they additionally by new regulation provided that the Agency had to give permission to any of their employees who Schutterle might subpoena to testify in the Iowa proceeding concerning its accuracy, and FURTHER that only employees who would testify IN FAVOR OF the Agency could have such permission. That is, even though the agency work product was demonstrably inaccurate, and even though employees within the Agency with knowledge were individually willing to so testify, the Agency could prohibit their attendance in the state proceeding to so swear! The Agency did exactly that in this case. Schutterle protested to the Iowa judicial officer that this regulation, facially and as applied, violated his federal rights. That judicial officer refused to consider the matter and found that Schutterle

could take this to a federal court for determination. In doing so the federal court dismissed his complaint finding he had no standing to complain! In the federal action, Schutterle attempted, but was denied any discovery concerning the truth of materials he was able to procure. Some materials procured indicate that federal Actors did actively participate in the Iowa proceeding behind the scenes, and did act to obstruct Schutterle's presentation of evidence in that case.

The state judicial officer violated Schutterle's federal rights by refusing to consider and to protect Schutterle's federal Constitutional rights when raised to him, and that as such is actionable in the United States District Court for limited damages, injunctive relief and declaratory judgment. A Circuit Judge stated during oral argument that refusal to address Constitutional issues was perfectly alright, and words to the effect that "We do it all the time."

This action was commenced in the United States District Court. (Initially Schutterle acted pro se, but later he approached present counsel who had entered the state court proceeding, and such counsel also appeared federally). Issues center upon matters above, and whether that Court should have allowed discovery prior to dispositive motion hearing, whether the magistrate made a dispositive ruling in refusing to allow amendment to the Complaint, whether Schutterle had standing to complain, and whether action is maintainable against the state judicial officer.

Modern Soil Survey: Field work for the Modern Soil Survey for Iowa County conducted by the U.S.D.A., Soil Conservation Service, was done in the period of 1956-60. The Survey purports to show conditions as they existed in 1965. The Survey was published in 1967. The Survey proceeds from aerial photographs to soil scientists viewing the site, coring and testing to determine soil types and

classifications. At the time of field work this twenty-five acres was covered by timber. Frederick was one of those scientists who originally researched the data and mapped areas of Iowa County as shown in the Survey. He was one of the witnesses for Schutterle in the Iowa District Court.

Facts at State Trial: Schutterle commenced an Iowa proceeding in which he protested the state's assessment.

He offered the testimony of two former USDA soil scientists who had originally prepared the materials for such Survey. One had done some of the actual research and mapping which is found in the Survey for Iowa County, admitted as "Exhibit 4" in the Iowa trial. Defendants offered no testimony of a witness who had viewed the property.

Schutterle testified that the assessment was not fair because it used the Survey in computation of the assessment, and that Survey did not accurately reflect actual conditions.

Frederick was called on behalf of Schutterle. Frederick is a retired soil scientist who worked in that field for over twenty years. He had worked for the S.C.S. during those years mapping thousands of acres, including a large part of Iowa County. Frederick obtained from the Assessor the formulas used in assessing for the 1989 tax year. Applying those formulas to the actual conditions he had found he computed the true value based upon actual Corn Suitability Ratings. The Assessor in utilizing the Survey had applied 1884.25 CSR units to this tract. After mapping this tract correctly, Frederick found that only 1246.60 CSR units should have been applied to find assessed value. The Assessor's valuation was 151% of what the correct assessed value should be, or that the actual corrected assessed value was only 66% of that of the Assessor.

Dubbels, the Iowa County Assessor, verified that had

the Modern Soil Survey been mapped originally as shown by the recent mapping by Frederick, that Frederick's computation applying such mapping to formulas used by her would be correct.

Johnston was subpoenaed by Schutterle. He is employed by the S.C.S. At trial he produced a regulation and letter indicating that the S.C.S., Wash., D.C. would not allow him to testify for Schutterle. Schutterle objected to Johnston not being allowed to testify, application of the regulation, to another employee of the same agency being allowed to testify against Schutterle, and to the impropriety of allowing a federal executive agency to dictate to a state court the extent of its process and the controlling of witnesses before it.

During the pendency of the appeal to the Iowa District Court, and after issuance of subpoena to Petitioner's federal witness, the federal executive branch, promulgated 7 C.F.R. Part 1 published in the Federal Register on October 19, 1990, prohibiting federal employees from testifying in state proceedings without prior consent of the agency. Prior to promulgation of that regulation, Petitioner had subpoenaed the District Soil Conservationist (Johnston) of the USDA Soil Conservation Service. Federal defendants here requested additional continuances, apparently being aware that promulgation of the regulation was underway. (Plaintiff has been denied discovery including any to learn whether his state action was a motivational cause for such regulation). Defendants subpoenaed the federal State Soil Scientist (Shellentrager) of the USDA S.C.S. The USDA consented to this witness as being favorable to their position, but refused permission of Johnston who they saw would be adverse to their position. Schutterle objected to the constitutional validity of this regulation, and to any testimony by Shellentrager. The Iowa District Court expressed concern on

this matter and directed this concern to Shellentrager. Schutterle submits that the Iowa court violated his federal Constitutional rights in allowing this regulation to defeat its state compulsory process and in allowing a federal executive agency to sort through which witnesses a Court of the Sovereign State of Iowa could call. Schutterle submits that the regulation is invalid, not mere "housekeeping" and the Iowa court was required to have heard him upon this matter.

The State admitted that the testimony of Johnston would have been favorable to Schutterle.

Taxation in Iowa is repeated every year. Iowa law charges its assessors to "place emphasis" upon the Survey in assessing. This case centers upon forty acres of land upon which the Survey is demonstrably incorrect. The Survey is the measuring stick by which the Iowa assessor is to place value. It is true that each year Schutterle can undergo the expensive and time consuming ordeal of protesting and initiating litigation to again demonstrate the inaccuracy of that Survey. However, such repeated expense of time, effort and money is substantive in nature and also bears directly upon the continued feasibility of ownership.

Although the Government admitted that where the Government is a "party" the "Touhy" regulations do not apply, the Circuit found it controlling. The Government thrust itself into the state litigation with the mind set of determining outcome for its own selfish purposes.

In considering whom could testify in this state matter, personnel for the Agency observed that:

> "The issue of the accuracy of SCS completed soil maps in accordance with agency technical criteria is very important to our agency and is central to our mission".

"I expressed my reservations that the ramifications of this case, for SCS purposes, went far beyond Iowa County".

"This is a national issue as far as the SCS is concerned even though local government units are currently involved."

"I told Ken that I rather not have any one else from my staff testify in such a sensitive case",

". . . it may well be necessary to defend the validity of its soil studies wherever they may be challenged".

The foregoing make it abundantly clear that the SCS perceived that matters in the state court proceeding were of vital interest to the Agency itself. Its own ox stood to be gored! Those observations completely support Schutterle's position - that USDA sorted the witnesses in order to affect outcome of a matter in which it had a vital interest. USDA did have a VITAL INTEREST in the outcome of the state proceeding, which it itself characterized as "very important to our agency and is central to our mission". Where the agency itself has vital interest which will be determined, such pre-sorting by the regulation must fail constitutional muster.

The regulation was not mere "housekeeping" internal to the Agency. It is a clear fact that the Agency had vital interest in outcome. Decisions bearing upon outcome are not merely "housekeeping". They relate to procedural due process and equal protection. Here they have fundamental substantive ramifications.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Issues are exceptional. Decision appears to be in conflict with Jones v. Clinton, 72 F.3d 1354 (CA 8 1996).

STANDARD OF REVIEW: Errors asserted are plain errors of law or abuse of discretion as in U.S. v. Olana, 113 S.Ct. 1770, 1776-79 (1993). While some are procedural they bear heavily upon Schutterle's substantial rights. Matters of Constitutional nature may involve a totality of the circumstances consideration. Errors asserted here were timely raised to the Court below. They were in fact first timely raised to the Iowa Courts, which refused to meaningfully address them observing that they could be heard in an appropriate federal court.

ISSUES PRESENTED

ISSUE NO I: **The District Court erred, when it refused to find or declare that, for multiple reasons, regulation 7 C.F.R. Part 1 (55 Federal Register 42347, October 19, 1990) is constitutionally impermissible, invalid and repugnant, facially and as being applied.**

A. **The regulation is legislation attempted by Executive Branch which exceeds the powers granted by Article II.**

Under Article II, the Executive Branch has no inherent powers and no power to legislate. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

This regulation is not mere exaction of loyalty or incidental "housekeeping" regarding what Executive Branch employees can or cannot do. Its reach is much further than

that, especially when as in 1.214(b) it limits appearance (and testimony) of its employees to that which is in the interest of (only favorable to) the Agency. It is a blatant attempt to extend the weight and effect of its own Agency and work product, and of the Executive Branch of the United States, into a sphere of activity reserved to the states. Those persons most knowledgeable concerning such work product cannot appear impartially to disclose the full and complete truth as they know it - they can appear only when such appearance will strengthen and support the Agency. Even when that work product is demonstrably in error, and works damage to a citizen in a state forum, they must still articulate only the Agency position.

The lower Courts placed heavy reliance upon the decision of Touhy v Ragen, 340 U.S. 462 (1951). Such reliance is misplaced for the reason that Touhy was concerned only with the "the custody, use, and preservation of the records, papers and property appertaining" to an agency, and not with testimony of agency personnel concerning those documents. As Mr. Justice Frankfurter made clear in concurrence (at page 470) the head of an agency cannot forbid his subordinates from producing relevant documents. Also, Touhy does not apply where the Government is a party - which it effectively was.

The opinion of Circuit Judge Weis, pp 1188-1191 in the case of Davis Enterprises v. U.S. E.P.A., 877 F.2d 1181 (C.A. 3, 1989), is cogent and well-stated, and each and every reason he urges, is adopted and incorporated verbatim herein as additional reason why partial summary judgment should not have been entered in this case. Without limiting the foregoing, Judge Weis points out that controlling issue in Touhy was immunity for a subordinate agency employee who faced the impossible dilemma of process requiring that he produce documents and an order of his superior that he

not.

B. **The Regulation is legislation attempted by Executive Branch which violates Separation of Powers.**

Only Congress has the power to legislate, and its powers to do so are enumerated and limited. Purported legislation in the nature of the regulation in issue, violates the doctrine of separated powers. Synar v. United States, 626 F. Supp. 1374 (DDC 1986) aff'd in part on direct appeal to the United States Supreme Court in Bowsher v. Synar, 106 S.Ct. 3181 (1986)

C. **The Regulation exceeds any powers granted by Article I, Section 8, concerning Congressional legislation; by implication, therefore exceeds any power of Executive Branch to legislate; and to the extent that Congress may have purported to delegate such right to legislate exceeds the power to so delegate.**

"The Government of the United States is one of delegated powers only. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people." U.S. v. Cruikshank, 92 U.S. 542, (1875)

This regulation would be beyond the power of Congress to legislate under Article 1, Section 8. If Congress could not legislate it, then Executive Branch with no legislative powers cannot. Also, Congress cannot bestow or grant to Executive Branch the power to so legislate, especially without setting forth specific parameters and limitations. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Synar v. United States, 626 F. SUPP. 1374 (DDC 1986) Aff'd in part Bowsher v. Synar, 106 S.CT. 3181 (1986).

D. **The Regulation denies due process of law guaranteed by the Fifth and Fourteenth Amendments including without limitation, by denying necessary witnesses to a party in the state forum to obtain meaningful hearing; is impermissibly vague and indefinite; and authorizes ad hoc determinations by Executive Branch employees concerning testimony allowed in each case without definite pre-set standards, and is arbitrary and capricious including for the reason that it only permits testimony of those deemed favorable to the agency.**

The Iowa Constitutional Convention which enacted Article I, Section 4 of the Iowa Constitution, observed that a citizen must have the right to introduce testimony in any dispute to protect his life, liberty and property, for ". . . without this right, the protection held out to him by the constitution would be no better than heartless mockery - it would be to invite him into the temple of justice while the doors are bolted and barred against him. . . . " Such Iowa guarantee defines the federal due process to which he is entitled in an Iowa forum irrespective of whether necessary witnesses are federal Agents. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980).

E. **The Regulation denies Equal Protection of law and equal opportunity at the bar of justice, including for reasons set forth above, guaranteed by the Fifth amendment and implied from the Fourteenth Amendments.**

The Regulation serves to deny a party equal protection of the law in the state forum, as implied in Bolling v. Sharp, 347 U.S. 497 (1954). Schutterle, by Executive fiat, was denied equal access to the most knowledgeable witnesses concerning federal work product directly

impacting him negatively.

F. **The Regulation interferes with state sovereignty and the separation and balance of powers inherent in the concept of federalism as intended by the Founders, and thereby denies individual rights under the Ninth, Tenth and Fourteenth amendments; and without limitation, it purports to allow federal Executive Branch to sort through and pre-determine which witnesses can testify in a state forum concerning agency work product.**

Tenth Amendment, United States Constitution; 28 U.S.C. Sections 1251-1257; The Status of Federalism in America, A Report of the Working Group on Federalism of the Domestic Policy Council, (November, 1986), "The Federalism Report"; U.S. v. Lopez, 115 S.Ct. 1624 (1995); National League of Cities v. Usery, 426 U.S. 833 (1976). Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

As Mr. Justice Kennedy noted in U.S. v. Lopez, 115 S.Ct. 1624 (1995), federalism was the unique contribution of the Founders by which to separate powers to be exercised by state and federal governments and to thereby guarantee the continued liberty of their citizens. Pronouncement by Federal Executive Branch that only its employees who will testify favorably to the Agency can testify in a state forum severely interferes with that otherwise rather tenuous balance. The regulation pre-ordains by Executive fiat, that of those persons most knowledgeable concerning its work product, only those may testify who totally support its content. Executive Branch work product must be embraced if the witness is to testify. Disclosure of inaccuracy is prohibited, because such disclosure would not be in the interest of the Agency. The truth is irrelevant. Executive fiat

controls. This is calculated to affect in large measure the substantial outcome in the state forum.

The U.S. District Court stayed any discovery, and heard the Motion for Summary Judgment without Schutterle having the opportunity to obtain materials in the exclusive knowledge and control of the Government, or to seek admission from the Government of the truth of materials which he did have. The Circuit observed that Schutterle had produced no evidence, totally ignoring that he had been denied discovery - itself a denial of rights. U.S. v. Hashimoto, 878 F.2d 1126 (1989). The Honorable Jim Nussle, Member of Congress, obtained for Schutterle some materials which Schutterle received only after the District Court had first ruled, but which bore upon matters and facts before the Court. Those materials together with the fact that the Government was directly instrumental in having the Iowa District Court case continued from July 10, 1990; then Sept 19, 1990 and make it clear that the Government deliberately thrust itself into the state action and caused continuances. The Agency acted contrary to its' avowed policy of "remaining strictly neutral" (See, Moore v. Armour Pharmaceutical Co., 927 F.2d 1194, 1196 (CA 11 1991).

G. The Regulation limits and denies access to the Iowa Court, and the right to petition for redress, by denying the most knowledgeable witnesses to that forum; and sweeps protected activity into the prohibited area, in violation of the First and Fourteenth Amendments.

Amendment One of the United States Constitution guarantees the right of access to the Courts and to petition for redress, California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972). Like Article I, Section 4 of the Iowa Constitution addressed above, the right to petition

and for access to the courts carries with it the means of exercise - the ability to produce those witnesses with the most knowledge. Executive fiat which provides that federal work product will be taken in and accepted as is in the state forum without opportunity to challenge it by use of those witnesses most knowledgeable concerning its frailties, effectively diminishes or destroys the right.

H. **The Regulation denies to Schutterle as an inhabitant of Iowa full access to the guarantees inherent in a Republican Form of Government, by implication if not directly, by allowing only witnesses deemed favorable to the Agency to testify in the state court concerning a federal work product being utilized for state purposes, and by denying to him in that forum, other Agency witnesses knowledgeable and willing to testify against the Agency work product.**

Article IV, Section 4 of the United States Constitution guarantees to the inhabitants of a state the right to republican form of government. Reynolds v. Sims, 377 U.S. 533, 582 (1963). Such form of government assumes that the sovereign courts of a state will hear, and litigants within them can have produced, witnesses having knowledge of the truth of matters in dispute. A federal regulation which purports to pre-classify those witnesses who will be available is a direct interference with such guarantee.

I. **The Regulation violates the Doctrine of Ipse Dixit, and is subject to the presumption of unconstitutionality.**

The regulation is an exercise of the ancient precept that matters are true and to be accepted because the King

has so spoken. It is an exercise of governance by Executive fiat only. Lucas v. South Carolina Coastal Counsel, 112 S.Ct. 2886, 2901 (1992); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).

J. **Schutterle had standing to contest this matter.**

Continuing error within The Modern Soil Survey impacts substantive rights of Schutterle, both state and federal. It is the measuring device used by the Iowa County Assessor to compute assessment for real property taxes. It also directly bears upon other federal programs available. Measurable substantive impact gives standing. Barlow v. Collins, 397 U.S. 159 (1970). Schutterle has suffered, and will suffer in the future, legal wrong because of agency action or inaction. Woodsmall v. Lyng, 816 F.2d 1241 (CA 8 1987). A federal regulation which by fiat denies to Schutterle the most knowledgeable witnesses concerning such work product gives him standing to challenge such regulation.

The so-called agency "expertise" is in fact not an "expertise" or body of knowledge confined to the agency. It involves expert knowledge and opinion available outside the agency. Because there is expert opinion and knowledge available outside the agency, matters concerned in the issue of correction of the Survey poses a problem no more complex than many others faced everyday by the Courts. The Court can easily determine whether the agency has abused its discretion. However, because the federal work product is given such undue weight and effect because of federal supremacy or otherwise, and federal employees who might show its frailties or inaccuracies are prohibited from testifying against it, the availability of witness from outside the Agency does not correct the situation.

There is no need for the sovereign to consent to an action to declare acts unconstitutional. Unconstitutional acts

are not official acts under law. Ex Parte Young, 209 U.S. 123 (1908). Acts in violation of the constitution are the proper subject of judicial review. Woodsmall v. Lyng, 816 F.2d 1241, (CA 8 1987).

K. **District Court and the Circuit Court had full jurisdiction.**

Plaintiff did not seek review of a state decision. The District Court and the Circuit Court had full jurisdiction to declare constitutional invalidity. New York v. United States, 120 L.Ed.2d 120 (1992) involved a very similar claim for declaratory judgement concerning constitutionality. There this Court held that 1) The federal courts (but not Congress) by virtue of the Supremacy Clause, have the Constitutional authority to order state officials to comply with federal law (120 L.Ed.2d at 152), 2) the creation of separate state and federal powers is for the ultimate goal of protecting, not the sovereignties, but rather individuals from an excessive accumulation of power (120 L.Ed.2d at 154, 3) state and federal officials cannot (even by agreement) conspire to depart from the constitution (120 L.Ed.2d at 154), and 4) the Federal Government may not compel the States to administer a federal regulatory program (120 L.Ed.2d at 158).

Sovereign Immunity is no impediment. An administrative claim is not required for action based upon the Constitution. The statutes expressly so state. See, 28 USC 2679(b)(2) (administrative claims required under 28 USC 1346(b); 28 USC 1346(a)(2) (requiring no administrative claim). Also, Congress lacks the power to impose such limitation upon any right and remedy which flows directly from the Constitution. There is no immunity for violating the Constitution of the United States.

Sovereignty. Aside from the foregoing, it is interesting to note that the Government claims to be

"sovereign". The Constitution guarantees that the people are sovereign. The Supreme Court has stated that in the United States the people are sovereign. Afroyim v. Rusk, 387 U.S. 253 (1967). The people of a state are entitled to all rights which formerly belonged to the King by his prerogative. Lansing v. Smith, 4 Wend 9, 20 (1829) See, Julliard v. Greenman, 110 U.S. 421 (1884)(Field dissenting).

The District Court relied upon representations of the Government to it that Purcell was not involved at all. Materials discovered since that time demonstrate that such representation was not true and that he was actively involved. The Government then shifted its position by asserting that he had immunity.

ISSUE NO II: **Promulgation of the Modern Soil Survey with no means whereby an aggrieved party could obtain meaningful review within the agency for correction of error is a denial of Due Process.**

The Government admitted that it had no administrative procedures by which to seek correction of the Modern Soil Survey. It denied that it had any obligation under law to so provide them.

Failure of the agency to provide a meaningful means whereby its faulty work product could be reviewed within the Agency and thereafter appealed to a Court is a denial of Due Process. Mathews v. Eldridge, 424 U.S. 319 (1976)

The agency has no procedures in place whereby an aggrieved party can seek to correct errors in the Survey. The Agency subscribes to a totalitarian approach in the nature of ipse dixit. That is, the emperor has so ruled. The denial of procedures for the correction of errors relates to due process. Due process concerns a "body of law" with which the Courts are very familiar. The denial of procedures whereby one can

petition to correct error where taking of property by taxation or otherwise is an obvious denial of due process.

An Agency may be able to exercise some discretion but that discretion is not limitless. There is nothing in the area of soil science that is so esoteric that a trial judge cannot determine whether it is factually supported. This is the kind of determination which fact finders are required to pass upon every day.

What the agency is really urging is that the Courts cannot supplant their opinion for that of Executive Branch "experts", and that there are no set standards for doing so. The Soil Survey has tremendous actual and potential impact upon those within its scope - some extending to possible application of criminal sanctions. The Government claims a prerogative, similar to that claimed by royalty, and to resort to ipse dixit - rule by fiat. Not only does it refuse to provide procedures within the agency whereby obvious errors can be corrected, it does not wish the Courts to review its findings and to be able to correct them, even when they are demonstrably in error and are severely impacting the rights of a citizen.

The Agency urges that there is no law by which a court could review its study. That argument may prove too much. The agency has no inherent powers. It is charged under the Constitution to see that the laws of the United States are faithfully executed. Congress can legislate only within the parameters of the provisions of Article I, Section 8. By what enumerated power does Congress have authority to grant to Executive Branch the power to, by ipse dixit alone, promulgate and declare a soil science and results, and to apply such science and results to specific individuals and lands,to add to, or diminish, or to vary, the economic value and permitted uses of various lands at the sole unbridled discretion of USDA, without possibility of any review. What

standards, parameters and limits must USDA adhere to in so doing? If there is no body of law to be applied then Schutterle would assert that the legislation by the Congress is an unconstitutional delegation. It also violates the separation of powers by purporting to grant to the Executive Branch a power to legislate the field. Further, it exceeds any power of Congress under Article I, Section 8, and it does not sufficiently set forth the power under which it purports to act so that the Courts can determine on a case by case basis whether such power exists or was properly exercised. See, U.S. v. Lopez, 115 S.Ct. 1624 (1995).

ISSUE NO III: **Federal Courts have no inherent power to, and under Article III cannot, legislate exception to the "every person" language of Section 1983, a clear and unequivocal remedy duly enacted by the Congress; federal law has no interest to be advanced by creating exception for state judges to the "every person" language of Section 1983, and under the Supremacy Clause a state cannot create an immunity in state judicial officers which would diminish or defeat a federally-legislated remedy; and because a state judge has a duty to uphold the federal constitution, and under federal Due Process the state constitution, Schutterle had standing, and the federal court had jurisdiction, on claim for past damage, and for injunction and declaratory relief to prevent probable future damage.**

As part of his claim for declaratory relief Schutterle asked the District Court to declare the PRESENT SOURCE of any claimed immunity for the state judge - not what may have existed at some time in history, but NOW. If the source is claimed to be the common law - WHOSE PRESENT common law - that of the state or federal? Assuming that federal common law no longer exists, or cannot be invoked to defeat a federal statutory remedy, it must be a state

common law immunity which devolved from the English common law at the time the colonies were settled. How can a STATE common law immunity defeat a SUPREME federal STATUTORY remedy? That question haunted Congress in 1871, whose Members thought it had been laid it to rest. That specter continues in the Courts who labor to "find" exceptions to the unequivocal language.

Congressional debate following the Civil War involving what ultimately led to passage of the Fourteenth Amendment recognized that oaths of office to support the Constitution of the United States were being blatantly ignored by state officials. Bingham, THE CONGRESSIONAL GLOBE, 39th Congress, 1st Sess., Feb. 26, 1866, H.p. 1090. Section 1983 was passed to provide remedy for violation of federal rights where no adequate state remedy was available. Paul v. Davis, 424 U.S. 693, 717 (footnote 3) (1976). In his treatise, Federal Civil Rights Acts, Bancroft-Whitney Co., San Francisco, 1971, p. 67, Chester J. Antieau ventures his opinion that Congress intended to abolish any common law immunities. In Monroe v. Pape, 365 U.S. 167, Mr. Justice Douglas examined in detail the history which gave rise to the enactment of Section 1983. Elsewhere, he observed that every member in the Congress who spoke on Section 1983 assumed it would impose liability upon state judges. Douglas, dissenting in Pierson v. Ray, 386 U.S. 547, 561 (1967). Mr. Justice Marshall in dissent in Briscoe v. LaHue, 103 S.Ct. 1108, 1128 (1983) noted that Congress passed a bill in 1866 which contained criminal sanctions concerning state judicial officers, that President Johnson vetoed such bill as unduly infringing upon the state judiciary, and that within two weeks Congress overrode the veto with its Members observing that the act was aimed at state judges. On this, Mr. Justice Marshall noted:

"To assume that Congress, which had enacted a

> criminal sanction directed against state judicial officials, intended sub silentio to exempt those same officials from the civil counterpart approaches the incredible."

Bradley v. Fisher, 13 Wall 335 (1872) is assumed to be the seminal case of this Court addressing judicial immunity. That case involved a federal judge. The Court claimed to apply its conception of English common law immunity apparently as a part of the federal common law. (Swift v. Tyson, 16 Pet. 1 (1842) prevailed and had not yet been modified by Erie Railroad v. Thompkins, 304 U.S. 64 (1938)). Every member of Congress who spoke on the issue in regard to Section 1983 assumed that such Section made state judges liable. Events in the Bradley case (concerning a federal judge) occurred before enactment of Section 1983, which Congress assumed rendered state judges liable. In light of this, it would appear that following enactment of Section 1983, Ex Parte Virginia, 100 U.S. 339 (1880) should be viewed as the leading light, controlling regarding liability of state judges under Section 1983. In Pulliam v. Allen, 80 L.Ed. 565, 578 (1984) this Court noted that it had earlier "declined to impute to Congress the intent to abrogate common-law principles of judicial immunity", that nothing supports the conclusion that "prospective collateral injunctive relief" was not intended, and that Congress intended to reach unconstitutional acts of all state actors including judges. Declaratory relief of prospective nature must likewise fall within this aegis.

The analysis of the Bradley Court concerning common law judicial immunity was highly in error - and such faulty analysis has resulted in judicial officers laying claim to much more immunity in a Constitutional Republic than they would have had under a monarchy - even an absolute one! Dating to 1215 in the Magna Charta, Article 61 (Henderson translation) the King acknowledged that if the

King or his justices shall have transgressed against anyone in any respect and he does not amend such error, his castles, land and possessions can be taken to make amends - everything saving our own person, the Queen and the children! This is not a statement supporting absolute immunity! See also, Case of Marshalsea, 77 Eng. Rep 1027 (1613); Floyd v. Barker, 77 Eng. Rep. 1305 (Star Chamber) (1607); Feinman and Cohen, Suing Judges: History and Theory, 31 South Carolina Law Review 201 (1980). It should be also noted that following the two cases relied upon by the Bradley Court in finding judicial immunity, the source of power of the English King (and his justices) shifted from absolute divine origin to the People in a constitutional monarchy!

At the outside, as Mr. Justice Douglas stated in his dissent in Pierson v. Ray, 336 U.S. 547, 567 (1967), citing Ex Parte Virginia:

> "When a judge acts intentionally and knowingly to deprive a person of his constitutional rights he exercises no discretion or individual judgment; he acts no longer as a judge, but as 'minister' of his own prejudices."

In any meaningful analysis addressing a claim of absolute or qualified "immunity" concerning a state judicial officer, one must FIRST look to the underlying purpose for such claimed immunity, and the claimed SOURCE of such immunity. The obvious purpose and intent of any grant of immunity is to advance, foster and protect certain acts undertaken within a certain sphere of activity. A state has an interest in protecting its actors when doing state acts; and the federal government has an interest in protecting its actors in doing federal acts. Each has its own sphere of action to protect.

In debating Section 1983, members of Congress were well aware that a state cannot interpose immunity to defeat

the effect of a federal remedy. Because the Supremacy Clause forbids this, this became a major concern of Congress. Garfield, APPENDIX TO CONGRESSIONAL GLOBE, 42nd Congress, 1st session, April 4, 1871, H.p.app. 149.

> "The state has no power to impart to him [state actor] any immunity from responsibility from the supreme authority of the United States." Ex Parte Young, 209 U.S. 123, 159 (1908).

It does not advance any federal interest for federal entities to create or to grant immunity to a state actor for the violation of its own superior federal law. The creation or granting of such immunity to a state actor to defeat superior federal law is against federal interests, and in fact the federal Constitution itself - which each actor is sworn to uphold!

The expressed "every person" language of Section 1983 admits to no exceptions! Congress did not express immunity to state actors for the violation of superior federal law. It was considered, and Members believed that they could not legislate exception for state judges or excuse them from not following superior federal law.

In Tenney v. Brandhove, 341 U.S. 367 (1951) this Court found exception to the general language of "every person" for a person acting in a state legislative committee under the Speech and Debate Clause of the federal Constitution (Article I, Section 6). Based upon the Constitution itself this Court found an exception to the "every person" language.

In later cases, this Court found exception to the "every person" language, based NOT upon constitutional basis, but solely by finding that state judges had "common law" immunity - an immunity much broader than any which existed at common law. Examination of such "common law" immunity discloses that the "common law" immunity now purportedly afforded to state judges in this Republic is much

broader than any afforded to judges in England, even during the period of absolute monarchy!

It is against the interest of the federal republic that immunity exist for the violation of federal laws. It is especially against the federal interest to grant immunity from the effects of a federal statute intended by Congress to be a remedy for violation of the Constitution itself.

It is respectfully submitted that this Court has exceeded its powers under Article III by legislating an exception to the "every person" language.

It is respectfully submitted that this Court has exceeded its powers under Article III and the Supremacy Clause by legislating or granting an immunity to state actors for violation of superior federal law, including those lawfully enacted by the Congress and for basis not founded upon the Constitution.

It is respectfully submitted that this Court has impermissibly violated the separation of powers doctrine by legislating an exception onto the "every person" language of the Act.

It is respectfully submitted that this Court has attempted to circumvent the foregoing by denying that it has created or legislated such immunity. It has, instead, attempted several rationalizations in justification. It has engaged the fiction that it has "found" such immunity. It has resorted to a finding of "Congressional intent", ie., Congress did not intend to abrogate common law immunities. In doing so it ignored that the immunities it "found" from common law, did not exist at common law even under the absolute monarchy! Also, in so doing, it ignores that Congress itself believed that it could not legislate exception from liability for state judges in not following the Constitution. Mr. Justice Scalia, in in Burns v. Reed, 114 L.Ed.2d 547 (1991), acknowledges that some of the

immunities were "found" by the Court long after 1871, but then urges they should be retained because of stare decisis. Respectfully, that observation makes strong recognition that the Court has in fact done the impermissible - it has judicially-legislated exclusion from the "every person" language. The Court has legislated exceptions for state judges onto language properly enacted by Congress. It has resorted to judicial interpretation or construction of Congressional language which is not ambiguous. It has created and thrust immunities for state judges into a sphere of action obviously not federal in nature to defeat superior federal law. It has, created exclusion from the "every person" language which, respectfully, directly assails the Supremacy Clause itself and removes the most effective sanction to insure that federal laws are adhered to and federal rights preserved.

Schutterle made timely presentation of his federal rights to the presiding state judge. Such rights were not addressed in a meaningful manner and he was told to take these later to a federal court. In a later proceeding in a federal court he was told he had no standing, the federal court could not grant injunction or give declaratory relief, and that the state judge had absolute immunity from a federal statute.

The United States Constitution, and the oath to support it, is the common thread which binds this Republic. It is extremely tenuous. Transgressions regarding such oath are not confined to those years immediately following the Civil War. They continue to this day. In our zest to return to greater states rights and the "new federalism" we must not forget the lessons of the past. The Constitution of the United States must be adhered to if this Republic is to survive. Conscience alone is not sufficient guarantee that those charged with following it will do so. To have effect there

must be effective sanction for failure or refusal to so adhere. Congress has legislated such sanction. It did so intentionally with full knowledge of the effect. In this action, Schutterle seeks enforcement of that sanction. Members of Congress in debating Section 1983 fully recognized that this would place federal judges in judgment of their state brethren. That was nothing new. IT IS ENTIRELY APPROPRIATE. New York v. United States,120 L.Ed.2d 120 (1992). While it may not be a pleasant task, it is absolutely necessary to insure that supreme federal rights have meaning and are adhered to. The Constitution so guarantees. The Congress has so legislated.

The Constitution of the United States requires an oath to support that Constitution. Every state judge gives solemn oath to do so. That Constitution makes it the Supreme law of the land requiring that federal laws be applied by state judges. Nothing in that Constitution, or any law pursuant to it, provides that a state judge, when faced with a Constitutional claim, can say, "I don't want to hear that argument or consider it. Take it to federal court". He is charged with the duty to meaningfully hear and consider it. To require anything less makes a mockery of the Constitution and of the meaningful hearing guaranteed by due process. Marbury v. Madison, 1 Cranch 137, 180 (1803). That mockery is magnified a thousandfold, when in the federal forum it is then asserted that the matter cannot be considered!.

If no one in a position of power is held to address those guarantees secured under the Constitution and by Acts of Congress, then those guarantees are hollow and meaningless. If we have come to that, how do we stand different from those French citizens at the time of the Bastille? What effective remedy remains?

CONCLUSION

Schutterle requests that this Court review and reverse the Circuit Court and order his action reinstated with his proposed amendments allowed, that he be allowed reasonable discovery concerning his claims, that the matter be ordered to trial upon the merits, and for such other relief as arises from the premises.

Respectfully Submitted,

Marlyn S. Jensen
2225 Robin Street
Osceola, Iowa 50213-8208
Telephone (515) 342-3530
ATTORNEY FOR PETITIONER

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2105

Loyel Schutterle,	*	
	*	
Appellant,	*	
	*	Appeal from the
v.	*	United States
	*	District Court for
United States of	*	the Northern
America, sued as	*	District of Iowa.
United States;	*	
Department of	*	
Agriculture;	*	
Robert Purcell,	*	
as agent for USDA;	*	
August F. Honsell;	*	
John Does, 1-10,	*	
Jane Does, 1-10,	*	
	*	
Appellees.	*	

Submitted: November 16, 1995

Filed: January 19, 1996

Before BOWMAN, BEAM, AND MORRIS SHEPPARD ARNOLD, Circuit Judges.

BEAM, Circuit Judge.

Loyel Schutterle contests a property tax assessment. As a result, he brought these 42 U.S.C. § 1983 and Bivens-type actions against various state and

federal defendants. The district court[1] granted summary judgement for the defendants on all claims. Schutterle appeals. Because we find Schutterle's arguments to be without merit, we affirm.

I. BACKGROUND

In June 1989, Schutterle filed a petition in Iowa County District Court appealing the 1989 property tax assessment of a forty-acre parcel of his farm. The appeal was Schutterle's third such appeal -- as well as his third loss. According to Schutterle, the inaccurate assessment was due to an inflated property valuation which resulted from the Modern Soil Survey's inaccurate map of his property. Schutterle maintains that the map erroneously depicted his land as containing 1884 corn suitability ratings (CSR) (a measure of soil productivity) instead of 1264 CSR.

At the state proceeding, the Iowa County Board of Review (the Board) subpoenaed two soil scientists, Thomas Fenton and Greg Schellentrager of the United States Department of Agriculture (USDA) Soil Conservation Service (SCS). The soil scientists provided testimony supporting the USDA's work product, the Modern Soil Survey, and thus supporting

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[1]The Honorable Micheal J. Melloy, Chief Judge, United States District Court for the Northern District of Iowa.

the Board's assessment of Schutterle's property. Schutterle also subpoenaed two soil scientists, Wayne Frederick and Kermit Voy, as well as an agronomist, Steve Johnston, a SCS employee, to show weaknesses in the Modern Soil Survey. Johnston declined to testify, however, and produced a letter in which the SCS denied him permission to testify pursuant to 7 C.F.R. § 1.214 (1995).[2] The agency reasoned that such testimony was not "in the interest of" the agency, as required by 7 C.F.R. § 1.214, because (1) Johnston was not an expert in the area[3] and (2) Schellentrager, who was an expert in the area, was already testifying in the case.

Although unable to call Johnston, Schutterle did elicit testimony from his two soil scientists. After hearing this evidence, the state court reduced Schutterle's property tax assessment by twenty percent. Schutterle appealed unsuccessfully to the Iowa Court of Appeals.

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[2] Pursuant to 7 C.F.R. § 1.214, a subpoenaed USDA employee is not authorized to appear as a witness in a judicial proceeding in which the United States is not a party unless the appearance has been approved by the head of the agency. As the United States was not a party to Schutterle's state court action, the head of the SCS had the discretion to deny Johnston permission to testify. See 7 C.F.R. § 1.214.

[3] As an agronomist, Johnston had less direct knowledge of soil surveys than did Schellentrager and the other soil scientists.

Unsatisfied, Schutterle then moved to federal court. He filed this action in the nature of a section 1983 action,[4] naming numerous federal and state defendants, including, but not limited to, the United States of America, the USDA, and the state court judge who dismissed his state appeal. Schutterle claims those persons and agencies, involved in either the promulgation or the enforcement of 7 C.F.R. § 1.214, violated his due process rights.[5]

II. DISCUSSION

To the extent Schutterle sought review of his state property tax assessment, the district court lacked subject matter jurisdiction over his claim. See Rooker v. Fidelity Trust Co.,

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[4] Upon realizing that section 1983 actions were unavailable against the federal defendants, Schutterle attempted to amend his complaint. The district court did not allow such amendment, but treated the proferred complaints as "briefs." From those briefs emerged the various constitutional and Bivens claims at issue here. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[5] The USDA's promulgation of 7 C.F.R. § 1.214 during the pendency of Schutterle's state court proceeding supplied fodder for an elaborate conspiracy theory wherein Schutterle claims that federal and state agents conspired to delay his state court action. This delay allowed the USDA more time to adopt 7 C.F.R. § 1.214, thereby preventing Schutterle's witness from testifying. Schutterle offered no credible evience in support of this conspiracy claim.

263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). To the extent Schutterle attacked the constitutionality of 7 C.F.R. § 1.214, we doubt the district court had subject matter jurisdiction. Nonetheless, we find that the district court properly disposed of the claim on summary judgement.

Section 1983 claims are unavailable against the named federal defendants* in this suit due to that section's state action requirement. 42 U.S.C. § 1983. A Bivens action, providing a cause of action against federal officers under the Constitution, is available against federal officers. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). However, Bivens actions are unavailable against these federal defendants. First, the United States and the USDA are not proper Bivens defendants because of sovereign immunity. Phelps v. U.S. Fed. Gov't, 15 F.3d 735, 739 (8th Cir. 1994), cert. denied, 114 S.Ct. 2118 (1994); Laswell v. Brown, 683 F.2d 261, 268 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983). Second, Robert Purcell, the regional USDA attorney, is not a proper Bivens defendant

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* The sole state defendant, the state court judge, is shielded from this action by judicial immunity and was properly dismissed from suit by the district court. Liles v. Reagan, 804 F.2d 493 (8th Cir. 1986) (judge acting within scope of judicial duties is absolutely immune from suit).

as named individuals must have been actively involved in the alleged constitutional violation to support Bivens liability. Laswell, 683 F.2d at 268. Schutterle has offered no evidence to that effect.

The remaining defendants are the John Doe and Jane Doe federal defendants. Schutterle failed to state a Bivens claim against these defendants as his allegations do not rise to the level of a constitutional violation. Schutterle claims that the operation of an unconstitutional regulation, 7 C.F.R. § 1.214, deprived him of his constitutional right to due process. However, 7 C.F.R. § 1.214 is clearly constitutional. See e.g., Touhy v. Ragen, 340 U.S. 462, 468 (1951); Ferrell v. Yarberry, 848 F.Supp. 121,123 (E.D. Ark. 1994) ("The U.S. Supreme Court has explicitly recognized the authority of agency heads to restrict testimony of their subordinates by regulations such as [7C.F.R. § 1.214]."") As 7 C.F.R. § 1.214 is constitutional, those involved in its promulgation and enforcement deprived Schutterle of no constitutional rights. Consequently, he has failed to state a Bivens claim against these defendants. We have considered the remainder of Schutterle's claims and find them to be without merit.

III. CONCLUSION

In sum, Schutterle is asking this

court to sit as a super-appeals court for his state property tax evaluation. This, we refuse to do. As we find Schutterle's claims to be without merit, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Loyel Schutterle, Plaintiff, v. UNITED STATES and UNITED STATES DEPARTMENT OF AGRICULTURE; ROBERT PURCELL as as agent for USDA; AUGUST F. HONSELL and JOHN and JANE DOE 1-10, Defendant.	)	NO. C93-43 SECOND AMENDMENT TO THE COMPLAINT

COMES NOW the Plaintiff and amends his original Complaint in each of the following specific regards:

JURISDICTION

1. By adding the following:
"Jurisdiction is also based upon the Supreme Court decision in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and thus directly upon United States Constitutional Amendments One (right of full access and to petition for redress, California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972)), Amendment 5 (right to due

process, and of equal protection implied as in Bolling v. Sharp, 347 U.S. 497 (1954)), Amendment Nine (reserved rights including without limitation those set forth in the Unanimous Declaration), and Ten (rights reserved to state and people sovereignty), Article IV, Section 4 (guaranteed right to republican form of government, Reynolds v. Sims, 377 U.S. 533, 583 (1963)); 28 U.S.C. 1346(a); 28 U.S.C. 2201; Article I, Section 8 (identifying enumerated powers) as interpreted without limitation by Miranda v. Arizona, 384 U.S. 436 (1966) (no legislation or rule making which infringes fundamental rights); Article II (defining Executive Branch powers), no inherent powers and no executive branch power to legislate as in (Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)):

> "Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative powers herein granted shall be vested in a Congress of the United States .... " After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be

> necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.";

28 U.S.C. 2072 (no power in Courts to abridge substantive rights, and by implication Executive Branch also lacks such power to abridge substantive rights); doctrine of separation of powers as in Synar v. United States, 626 F. Supp. 1374 (DDC 1986) aff'd in part on direct appeal to the United States Supreme Court in Bowsher v. Synar, 106 S.Ct. 3181 (1986); 5 U.S.C. 701 et. seq. and the complete lack of administrative procedures in regard to modifying the "Modern Soil Survey"; and the Supremacy Clause of Article VI; 28 U.S.C. 1346(b) (Constitutional Torts excepted)."

2. By amending paragraph 15 by adding the following and to provide that:

"15A. Defendant USDA has published a map which clearly demonstrates that the Modern Soil Survey is antiquated and not accurate in at least nineteen Iowa counties. See copy attached hereto as "Exhibit A".

15B. The State of Iowa, by statute, (I.C.A. Section 441.21) requires that the Iowa assessor charged with assessing land shall "place emphasis" upon the Modern Soil Survey in assessing such property, and makes no exception for those instances where the Modern Soil Survey is not

accurate.

15C. The Modern Soil Survey is inaccurate as concerns land of Plaintiff, including but not limited to:

> Northeast Quarter (NE1/4) of the Southwest Quarter (SW 1/4) of Section 6, Township 81, Range 9W of the 5 P.M., Iowa County, Iowa.

15D. Plaintiff had, and has, no meaningful means to obtain a correction of such Modern Soil Survey in the federal agency which prepared and promulgated it, for purpose of tax assessment.

15E. Plaintiff could not, and can not, obtain correction of the Modern Soil Survey for use (including into the future) by the Iowa County Assessor in assessing such property, in the Iowa Courts for the reason that under the Supremacy Clause the Iowa Courts lack jurisdiction and power to alter or modify work product of the federal agency, and for the additional reason that Plaintiff has been, and will in all probability, be in the future denied access for court testimony of those persons most knowledgeable concerning the Modern Soil Survey as it relates to his land for the reason that the regulation herein specifically addressed expressly forbids agency personnel from giving testimony perceived to be adverse to the agency work product.

15F. The Modern Soil Survey is, according to official publication of the USDA, antiquated in nineteen Iowa counties, and yet, the Iowa Assessor in

each of those counties is charged under Iowa law with placing emphasis upon such document for purposes of assessing the property, and there is no meaningful way under Iowa law or federal agency rule to challenge or obtain correction of such document, and in fact, federal regulation has been purportedly promulgated which prohibits one aggrieved from bringing into Iowa Court on their behalf the persons most knowledgeable concerning the inaccuracy of that federal work product."

DECLARATORY JUDGEMENT

3. By amending Paragraph 16 by substituting the following and to provide that:

"16A. Plaintiff, Loyel Schutterle asks the Court to determine and declare that Defendants, and each of them, have violated Plaintiff's federal rights, and to determine and declare each of the following:

a. That the regulation, 7 CFR 1 (Federal Register, Volume 55 No. 203, Friday October 19, 1990) is constitutionally impermissible, invalid, and repugnent for each of the following reasons:

(1) It is legislation attempted by Executive Branch which exceeds the powers granted by Article II.

(2) It is legislation attempted by Executive Branch which violates separation of powers.

(3) It would exceed any powers granted

by Article I, Section 8, concerning Congressional legislation; by implication, therefore exceeds any power of Executive Branch to legislate; and to the extent that Congress may have purported to delegate such right to legislate exceeds the power to so delegate. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Synar v. United States, 626 F. Supp. 1374 (DDC 1986) aff'd in part in Bowsher v. Synar, 106 S.Ct. 3181 (1986).

(4) It denies due process of law guaranteed by the Fifth and Fourteenth Amendments including without limitation, by denying necessary witnesses to the state forum to obtain meaningful hearing; is impermissibly vague and indefinite; and authorizes ad hoc determinations by Executive Branch employees concerning testimony allowed in each case without definite pre-set standards, and is arbitrary and capricious including for the reason that it only permits testimony of those deemed favorable to the agency.

(5) It denies equal protection of law and equal opportunity at the bar of justice, including for reasons set forth above, guaranteed by the Fifth Amendment and Fourteenth Amendments.

(6) It interferes with state sovereignty and denies individual rights under the Ninth, Tenth and Fourteenth Amendments; and without limitation, it purports to allow federal Executive Branch to sort through and pre-determine which witnesses can testify in a state forum concerning agency work product,

including its accuracy.

(7) It limits and denies access to the Iowa Court, and the right to petition for redress, by denying the most knowledgeable witnesses to that forum; and sweeps protected activity into the prohibited area; in violation of the First and Fourteenth Amendments.

(8) It denies to the State of Iowa a republican form of government, by implication if not directly, by allowing only witnesses deemed favorable to the agency to testify in the state court concerning a federal work product being utilized for state purposes, and by denying to Plaintiff in that forum, agency witnesses knowledgeable but willing to testify against the agency work product.

(9) It violates the doctrine of ipse dixit, and is subject to the presumption of unconstitutionality.

b. That the Modern Soil Survey as prepared and published by the Defendants concerning Plaintiff's land described as:

> Northeast Quarter (NE1/4) of the Southwest Quarter (SW 1/4) of Section 6, Township 81, Range 9W of the 5 P.M., Iowa County, Iowa.

is not accurate, is highly misleading, and must be corrected.

c. That there is, and has been, no realistic, proper or meaningful means to obtain correction of the Modern Soil Survey as it relates to such tract available through the Agency which satisfies the due process requirements of the Fifth Amendment.

d. That Iowa law requires that the Iowa actor charged with assessing the tract for purposes of Iowa real property taxes is required by Iowa statute to "place emphasis" upon the Modern Soil Survey (I.C.A. Section 441.21) and there is no meaningful means by which one can obtain correction, modification or review of that erroneous Modern Soil Survey as it relates to such tract for present and future Iowa assessment purposes."

4. By adding the following:

"21. Under 28 U.S.C. Section 1446(a) [sic] Plaintiff Loyel Schutterle asks for judgement against the federal actors, the United States and the USDA to the amount of his actual damages for such constitutional violations to an amount not to exceed in the aggregate of $9999.99."

s/ Loyel Schutterle

Loyel Schutterle
R.R. 1, Box 93
Norway, Iowa 52318
Phone (319) 227-7356

VERIFICATION

STATE OF IOWA)
) SS.
COUNTY OF IOWA)

I, Loyel Schutterle, being first duly sworn or affirmed, state and depose that I have read the foregoing amended COMPLAINT, that I am familiar with it's content, and that I understand it and swear that everything therein is true and correct to

the best of my information, personal knowledge and belief.

s/ Loyel Schutterle

Subscribed and sworn to before me on this 21st day of October, 1993.

s/ Debra E. Ehrmann

Notary Public in and for the State of Iowa

Notary Stamp

CERTIFICATE OF SERVICE

I certify that on October 21, 1993, a copy of the foregoing was sent by ordinary United States mail with sufficient postage to the following named person(s) at the address(es) shown:

Paul C. Lillios
U.S. Attorneys Office
P.O. Box 74950
Cedar Rapids, IA 52407

Julie Potterff
Hoover State Office Building
Des Moines, IA 50319

s/ Loyel Schutterle

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Loyel Schutterle, Plaintiff, v. UNITED STATES and UNITED STATES DEPARTMENT OF AGRICULTURE; ROBERT PURCELL as as agent for USDA; AUGUST F. HONSELL and JOHN and JANE DOE 1-10, Defendant.	)	NO. C93-43 MOTION FOR LEAVE ON THIRD AMENDMENT TO THE COMPLAINT

COMES NOW the Plaintiff and moves the Court for leave to file the Third Amendment to the Complaint, and states that:

1. His Third Amendment to the Complaint is herewith being tendered for filing.

2. Such Third Amendment more adequately and accurately presents to the Court of Plaintiff's claim concerning the state actor.

3. Such Third Amendment will enable the Court to more meaningfully address Plaintiff's claims and do justice.

4. F.R.C.P. 15 provides that such leave should be freely given when justice so requires.

WHEREFORE, Plaintiff moves that such Third Amendment be filed and made a part of the record for full consideration by the Court.

s/ Loyel Schutterle

Loyel Schutterle
R.R. 1, Box 93
Norway, Iowa 52318
Phone (319) 227-7356

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Loyel Schutterle, Plaintiff, v. UNITED STATES and UNITED STATES DEPARTMENT OF AGRICULTURE; ROBERT PURCELL as as agent for USDA; AUGUST F. HONSELL and JOHN and JANE DOE 1-10, Defendant.	NO. C93-43 THIRD AMENDMENT TO THE COMPLAINT

COMES NOW the Plaintiff and amends his original Complaint in each of the following specific regards, and by adding:

"13-A. In addressing the claim of absolute or qualified "immunity" one must look to the underlying purpose for such claimed immunity, and the claimed source of such immunity.

13-B. The obvious purpose and intent of any grant of immunity is to advance, foster and protect certain acts undertaken within a certain sphere or range of activity.

13-C. A state has interest in

protecting state actors in undertaking state acts; and the federal government has interest in protecting federal actors in undertaking federal acts.

13-D. A state cannot interpose a claim of state immunity to defeat the effect of a federal remedy because the Supremacy Clause forbids this.

13-E. It does not advance the interest of the federal government for it to create or grant immunity to a state actor for the violation of its own superior federal law.

13-F. The expressed language of Section 1983 of Title 42 pertains to "every person" and admits to no exceptions.

13-G. Concerning state actors, Congress did not by legislation grant federal immunity to state actors for the violation for their violation of superior federal law.

13-H. The Congress, in debating Section 1983, acknowledged that it could not legislate exception for state judges and excuse them from not following superior federal law without doing direct violation of the Supremacy Clause of Article VI.

13-I In Tenny v. Brandhove, 341 U.S. 367 (1951) the United [States] Supreme Court found an exception to the general language of "every person"; held that a person acting in a legislative committee

acted under the protection of the Speech and Debate Clause of the federal Constitution (Article I, Section 6); and found a constitutionally-based exception to the "every person" language of the federal statute, Section 1983.

13-J. In later cases, the Supreme Court expanded an exception to the "every person" language of 1983, not based upon constitutional basis of conflicting statute, but solely by holding that state judges had "common law" immunity.

13-K. A close examination of such "common law" immunity discloses that the "common law" immunity now purportedly afforded to state judges in this Republic is much broader than that afforded to judges in England, even during the period of absolute monarchy.

13-L. It is respectfully submitted that the United States Supreme Court has impermissibly undertaken to judicially-legislate an immunity exception onto the "every person" language of Section 1983, which Congress in its debates concerning such Section, found it could not legislate.

13-M. It is respectfully submitted that the United States Supreme Court has impermissibly exceeded its powers under Article III by legislating an exception to the "every person" language of Section 1983, an Act enacted by the Congress.

13-N. It is respectfully submitted that the United States Supreme Court has impermissibly exceeded its powers under Article III and the Supremacy Clause by legislating or granting an immunity to state actors for violation of superior federal law, including those lawfully enacted by the Congress.

13-O. It is respectfully submitted that the United States Supreme Court has impermissibly violated the separation of powers doctrine by legislating an exception to the "every person" language of an act of Congress, Section 1983, an Act passed by the Congress and which Congress found it could not itself legislate.

13-P. It is against the interest of the federal republic that immunity be given for the violation of federal laws, and especially a federal statute intended by Congress to include remedy for violation of the Constitution itself."

DECLARATORY JUDGEMENT

2. By adding the following to Paragraph 16:

"16-B. Concerning Judge Honsell, Plaintiff asks the the Court determine and declare that:

A. Under the Supremacy Cause, the State of Iowa cannot grant or create an immunity which would defeat rights arising under superior federal law.

B. For each of the reasons set forth in Paragraph 13 above, it is against the federal interest, and the federal government cannot grant, create or legislate an immunity to a state actor which would defeat it's [sic] own superior federal law, and the Supremacy Clause obligation that federal law be followed.

C. That the Court identify, determine and declare the source (federal or state law) upon which the claimed immunity of Judge Honsell rests."

s/ Loyel Schutterle

Loyel Schutterle
R.R. 1, Box 93
Norway, Iowa 52318
Phone (319) 227-7356

VERIFICATION

STATE OF IOWA)
) SS:
COUNTY OF IOWA)

I, Loyel Schutterle, being first duly sworn or affirmed, state and depose that I have read the foregoing amended COMPLAINT, that I am familiar with it's [sic] content, and that I understand it and swear that everything therein is true and correct to the best of my information, personal knowledge, and belief.

s/ Loyel Schutterle

Subscribed and sworn to before me on this 21st day of October, 1993.

Notary Stamp

Debra E. Ehrmann
Notary Public in and for the State of Iowa

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

LOYEL SCHUTTERLE, Plaintiff, v. UNITED STATES AND UNITED STATES DEPARTMENT OF AGRICULTURE, et al. Defendants.	)	NO. C93-0043 ORDER

This matter comes before the court pursuant to plaintiff's September 15, 1993 motion to compel discovery, defendants' September 24, 1993 motion for reconsideration, and plaintiff's September 21, 1993 motion for extension of time to resist the pending summary judgement motion. Plaintiff's motion to compel is denied. Plaintiff's motion for extension of time is granted. Defendants' motion for reconsideratiion is granted.

The defendants' motion for a protective order sought to alleviate the need to comply with discovery months prior to the filing of a dispositive motion raising qualified immunity as a defense. The motion was properly denied for that reason.

This court is well aware of the Supreme Court decisions holding that a public official should not be put through the rigors and expense of discovery when he or she has challenged the action based on the defense of qualified immunity. These decisions do not hold that a defendant can notify the court that some time in the future it may raise this defense and therefore avoid discovery. The grounds for summary judgement on qualified immunity, if they exist, were well known to counsel for these defendants when the answer was served. The motion was not raised then nor was it raised when the plaintiff commenced discovery. It was only raised several months after the plaintiff had commenced discovery.

Since then, the motion for summary judgement raising the qualified immunity question has been filed. Despite the fact that there is no good reason shown for this delay, the stay is nonetheless appropriate.

Upon the foregoing,

IT IS ORDERED

1. Defendants' September 24, 1993 motion for reconsideration is granted. Discovery is stayed pending resolution of the motion for summary judgement that raises the qualified immunity of the federal defendants.

2. Plaintiff's September 15, 1993 motion to compel discovery is denied

without prejudice to renewal in the event that this matter survives the pending motion for summary judgement.

3. Plaintiff's September 21, 1993 motion for extension of time to resist the pending summary judgement motion is granted. The resistance shall be filed on or before November 1, 1993.

October 4, 1993.

s/ John A. Jarvey
JOHN A. JARVEY
Chief Magistrate Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

LOYEL SCHUTTERLE, Plaintiff, v. UNITED STATES AND UNITED STATES DEPARTMENT OF AGRICULTURE, et al. Defendants.	)	NO. C93-0043 ORDER

Upon the foregoing,

IT IS ORDERED

1. Plaintiff's October 21, 1993 motion for leave to file a second amendment to the complaint (docket number 40) is denied as the document attached to this motion is more like a brief and shall be treated as such.

2. Plaintiff's October 21, 1993 motion for leave to file a third amendment to the complaint (docket number 41) is denied as the document attached to this motion is more like a brief and shall be treated as such.

3. Plaintiff's October 29, 1993 motion for extension of time (docket number 43)

is denied as moot.

November 10 , 1993.

s/ John A. Jarvey
JOHN A. JARVEY
Chief Magistrate Judge
UNITED STATES DISTRICT COURT